

Public Schools and the Pledge of Allegiance

IN JUNE 2002 THE UNITED STATES COURT of Appeals for the Ninth Circuit, in California, rocked the nation with a broad ruling against the constitutionality of including “under God” in the Pledge of Allegiance. Last February, however, the same court rewrote and greatly narrowed its decision. But two of the three judges continued to maintain that public elementary schools violate the Establishment Clause if they invite the students to recite the Pledge of Allegiance together (including the words “one nation under God”).

Last April, the solicitor general asked the U.S. Supreme Court to review and reverse the decision. Late in June, the plaintiff also asked the Supreme Court to review—but affirm—the decision. Understandably, he wants to turn his Ninth Circuit victory into a nationwide victory. Almost certainly, the Supreme Court will review this case. What is not certain is the result the court will reach.

The plaintiff is the Rev. Dr. Michael A. Newdow, an atheist minister dedicated to eradicating any governmental approval of religion. When the suit began in 2000, he had a five-year-old daughter in an elementary public school in the Elk Grove school district in California. He objected to his daughter’s being compelled to “watch and listen as her state-employed teacher in her state-run school leads her and her classmates in a ritual proclaiming that there is a God, and that ours is ‘one Nation under God.’”

When parties to a case ask the Supreme Court for review, they must specify the legal issues that they want the court to consider. The court may pick the issues it will review and even rewrite the questions. Much will depend on which questions the court agrees to review.

The solicitor general’s petition, for example, asks the court to decide two questions: Mr. Newdow’s standing to bring his suit, and the constitutionality of the traditional public school invitation to recite the Pledge of Allegiance.

In constitutional jargon, standing means that a plaintiff in federal court must have some practical stake in the outcome of the case (like money or getting into college). Having standing does not mean that you will win the case. Not having standing means that the federal courts cannot decide the case.

The solicitor general argues that Mr. Newdow lacks standing. For one thing, he does not have custody of his daughter or the right to control her education. Her mother does. The mother and the daughter like the Pledge of Allegiance and go to church together.

In some ways, the standing question is more complex than the Establishment Clause question. If a majority of the Supreme Court agrees with the solicitor general, the court will dismiss the case for lack of jurisdiction. The Ninth Circuit’s judgment will lose all value as precedent.

If, however, the Supreme Court holds that Mr. Newdow does have standing, the court will then proceed to a decision on the merits. In the light of our national history and many Supreme Court precedents, Mr. Newdow will then almost certainly lose.

Even without “under God,” no American child or adult can be compelled to recite the Pledge of Allegiance. So held the Supreme Court in the *Barnette* decision of 1943. Congress added “under God” to the pledge in 1954 as a way of differentiating our nation from the “godless regime” of the Communist Party then in power in the Soviet Union. During the last 50 years, the Supreme Court has cited *Barnette* with approval over and over again. In many decisions during the same period, the court has also referred approvingly to voluntary recitation of the pledge.

THE FEDERAL CONSTITUTION PROTECTS atheists and agnostics as well as believers against any form of governmental coercion to perform religious acts. But recitation of the pledge is not a religious act. At best, reciting the pledge is a political act. When recited by little children in public schools, the principal consequence is their recognition that class is about to begin.

Besides inviting the children to recite the pledge, public schools should educate the children (according to their age and learning level) about the freedom of every American to recite or refuse to recite the Pledge of Allegiance. If the Supreme Court reaches consideration of the merits of Mr. Newdow’s case, the court should hold that the constitution allows public schools to acknowledge what has been and still is one of the first principles of the traditional American political philosophy: “The People” created the government, and “God” (unspecified) created the People—everyone—with unalienable rights.

